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Supreme Court of the United States.

OCTOBER TERM, 1970

No. [redacted] 252

ROBERT F. WILSON,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

ROBERT A. STANZIANI
Counsel for Petitioner
40 Court Street
Boston, Massachusetts

f Counsel:
CHARLES M. BURNIM
100 State Street
Boston, Massachusetts

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Petitioner prays that a writ of Certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts, affirming his conviction for first degree murder.

Citation To Opinion

The opinion of the Supreme Judicial Court of Massachusetts is reported at 255 N.E. 2d 744 and is set forth in our Appendix, pp. 18-29.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether counsel is required at the photographic display of a criminal accused, conducted while the accused is in custody and in the absence of compelling urgency; and if such right to counsel existed, can it ever be treated as harmless error.

2. Whether the totality of the circumstances resulting in the identification of the petitioner by the eye witness Davis denied the petitioners due process of law.

3. Whether a criminal defendant is denied due process of law under the principle enunciated in *Brady* v. *Maryland*, 373 U.S. 83, where, though he has made appropriate and timely motions for evidence favorable to the defense, the prosecutor fails to disclose until after the direct testimony of an eye witness a police report obtained the day following the alleged crime, containing statements of the eye witness that he did not see the perpetrator's face.

Constitutional Provisions

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On June 7, 1968, the Grand Jurors for the County of Norfolk, Massachusetts returned an indictment against the petitioner charging him with murder in the first degree of one Richard Webber. (R. I.)[1] The petitioner entered a plea of not guilty and his trial before a jury was commenced on January 7, 1969. (Tr. 3)[2] On January 17, 1969, the jury returned a verdict of guilty of first degree murder with a recommendation that the death sentence not be imposed. (R. 35). The petitioner was forthwith sentenced to life imprisonment. (R. 35). The petitioner appealed to the Supreme Judicial Court of Massachusetts, and on February 12, 1970, that Court affirmed the petitioner's conviction. On May 6, 1970, Mr. Justice Brennan entered an order extending the time for filing a petition for Writ of Certiorari in this manner to and including June 12, 1970.

Statement of the Facts

At about 8:30 P.M., on Saturday, May 11, 1968, the petitioner and the deceased, Richard Webber, were patrons at an establishment known as the Quincy Lounge, in Quincy, Massachusetts. (Tr. 435). They had an exchange of words

[1] "R" refers to printed Summary of the Record.
[2] "Tr" refers to Transcript of Trial.

and a fight broke out between the two. (Tr. 440). They grappled to the floor, the petitioner astride Webber. (Tr. 441). The petitioner was pulled off Webber, but Webber then rushed the petitioner and the fight resumed. (Tr. 444). The fight was finally stopped, and the petitioner was put out on the street. (Tr. 447). While the petitioner was being removed from the lounge, Webber left the lounge by another door and proceeded in the direction of the North Quincy Taxi Company. (Tr. 448, App. -). The taxi stand was located approximately 400 feet from the lounge on the same street.

At approximately 9 P.M., Webber arrived at the taxi stand and entered. Two employees of the cab company were inside: John Davis, age 22, dispatcher, and Sean O'Brien, age 21, a driver. Webber looked nervous and afraid. (App. 19). "He walked to the desk at which Davis was sitting 'picked up the phone . . . dropped . . . [it], and . . . fumbl[ed] around with different objects on the desk.'" (App. 20). During the course of this activity, which was viewed by Davis, Davis obtained two "very quick, split second" glimpses of a man approaching the taxi stand. (Tr. 703). The first observation was when the man was some 50 to 60 feet away and the second at about 20 feet distance. After some conversation with Davis, Webber stepped outside the taxi stand. The man was then near the curb, about 12 to 15 feet from the office. Webber was yelling "leave me alone, stay away from me, leave me alone." (Tr. 708). The man stepped up on the curb holding a forty-five automatic in his hand. (Tr. 710). He leveled the gun and fired it at Webber, who was running from him. (Tr. 710). Immediately after the shot, Davis ducked behind a desk in the office. (Tr. 710). Seconds later, Davis looked up from behind the desk, and saw the man turn and run. O'Brien testified that he observed a man coming across the street with his hand inside his sweater at the hip, and that when he reached the

curb he pulled out a gun. (Tr. 811-12). When O'Brien saw the gun he ducked behind the desk. He then heard a shot. After the man fled, Davis and O'Brien stepped outside of the cab stand and saw Webber lying on the side walk about fifty feet from the stand. (Tr. 813). Davis went to Webber's aid, O'Brien called the police. (Tr. 814).

Davis testified on cross examination, that when he first observed the man at the curb, the gun was already in his hand, and that his total observation, from this time to the actual shooting was "very brief," about "five seconds." (Tr. 746). O'Brien testified on cross-examination, that the entire episode, from the time he saw the assailant crossing the street up to the shooting, was probably not more than thirty seconds. (Tr. 868).

On Sunday afternoon, May 12, 1968, the day following the shooting, the eye-witness O'Brien, attended a lineup at the Quincy police station. (Tr. 623). The petitioner was in custody and was in the lineup. The lineup consisted of nine men, three of whom were police officers recognizable to O'Brien. (Tr. 856, 890). The petitioner was the fourth man in from the right. The first three men on the right were the said police officers. (Tr. 890). The petitioner was represented at the lineup by retained counsel. O'Brien did not make an identification. (Tr. 623). On the following Tuesday, O'Brien called the district attorney and went to his office later that day. O'Brien discussed the case for about an hour with the district attorney and a state police officer. (Tr. 681). The next day he was visited at his home by two state troopers who informed him that they had a photograph of the lineup he had viewed that prior Sunday. (Tr. 886). O'Brien testified, that without being prompted and before viewing the photograph, he told the officers that the petitioner was the "fourth one in on the right as you are looking at the photo." (Tr. 886). O'Brien thereafter placed a circle around the petitioner's face on the photo-

graph. The petitioner's counsel was not present.

The eye-witness, Davis was not asked by the police to attend the lineup viewed by O'Brien. (Tr. 563). That evening, however, at the request of the police, Davis went to the Quincy police station, where in the absence of counsel, he was shown a photograph of the lineup previously viewed by O'Brien. (App. 22, Tr. 760-62). He made no identification. Later that evening Davis saw a TV news clip relating an arrest for the shooting. He saw the petitioner in handcuffs, surrounded by police, and heard that the petitioner was being charged with the murder of Richard Webber. (Tr. 564-5, 582). A few days later Davis was visited at his home by two state troopers, who, again in the absence of counsel, again showed Davis a picture of the lineup. (Tr. 576). Again Davis made no identification. (App. 22, Tr. 574).

On Sunday, May 19, 1968, Davis was again requested to come to the police station. This time he was alone with the prosecutor. (Tr. 569). Davis could not recall what they spoke about, but testified that the prosecutor told him he had a couple of pictures of the petitioner that he wanted him to look at. (Tr. 568). Davis was then shown a front view picture of the petitioner and a side view picture of the petitioner. (Tr. 570). Davis made no identification. (Tr. 570). He was shown no other photographs for comparison, and, again, petitioner's retained counsel was not present.

On May 24, 1968, at a probable cause hearing held in Quincy District Court, where it was quite apparent who the defendant was, Davis made an in-court identification of the petitioner. Davis never confronted the petitioner person-to-person before the probable cause hearing identification. (Tr. 574-781).

Both O'Brien and Davis identified the petitioner at trial and testified as to the prior photographic displays. They ascribed fear of repercussions, from a man whom they

both knew was in custody, as the reason for their prior failures at identification.

Reasons for Granting the Writ

I. Counsel is Required at the Photographic Display of a Criminal Accused Conducted While the Accused is in Custody and in the Absence of Compelling Urgency. A Denial of Such Right to Counsel Cannot be Treated as Harmless Error.

The petitioner argued below that the repeated exhibition of the lineup photograph and of the front and side view photographs of the petitioner to the eye-witness Davis, and the identification obtained from O'Brien upon the line-up photograph were in violation of petitioner's right to counsel under the Sixth Amendment, because they all took place without notice to and in the absence of petitioner's retained counsel, and that therefore, their in-court identifications were inadmissible.

On this issue, the court below reasoned that, "assuming that the exhibition of the defendant's photograph to the witnesses was a 'critical stage' of the proceeding, we do not believe that the absence of defense counsel at the confrontation resulted in 'substantial prejudice to the defendant's rights,'" and concluded that, "the absence of counsel was harmless error." (App. 24).

The petitioner agrees with the assumption of the court below that counsel was required at these confrontations, but contends that the violation of such right cannot be harmless error.

This Court has not directly ruled on the question of whether the Sixth Amendment requires the presence of counsel at photographic identifications of an accused who is in custody where such identification is conducted in the absence of compelling urgency. In *Simmons* v. *U.S.*, 390 U.S. 377, this Court had the opportunity to consider the applications of the principals of *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263, to the

photographic identification of an accused who was at large at the time of identification. The Court noted that substantially the same evils of identification in the absence of counsel at lineups apply to photographic identifications in the absence of counsel, but observed that the practice of photographic identification "has been used widely and effectively in criminal law enforcement from the stand point of *apprehending offenders* and of *sparing innocent suspects* the igñominy of arrest . . ." Id. 384. (Emphasis added). Where, however, an accused is in custody, neither of these considerations are relevant.

In *United States* v. *Collins*, 416 F.2d 696, the Court of Appeals of the District of Columbia recently had the opportunity to rule on a case quite similar to the instant matter. In that case, as in the instant case, a corporeal lineup was held. Only one of three eye-witnesses was present at the lineup. A photograph of the lineup was taken, and shown, in the absence of counsel, to the two remaining eye-witnesses. In holding that the defendant's Sixth Amendment right to counsel was not violated, the court noted that the two witnesses "were not reasonably available at the time of the lineup." Id. at 700.

Judge Winter, in dissent, pointed out that there was (a) "no satisfactory explanation why one of these two witnesses was not present at the corporeal lineup which was held, and (b) more importantly, the record contains no explanation why the government could not have conducted a second corporeal lineup for these two witnesses at a time convenient for them." Id. at 701. The Judge found no security in the witnesses' denial of suggestiveness by the authorities during the photographic identifications. He stated that "short of conscious and purposeful influence . . . the circumstances of the witnesses' photographic identification may have been such as to exert unconscious influence on them. They may not have been alert to this possible

suggestiveness — purposeful or inadvertent — but, once having identified Collins, they would be quite loath to recant." Ibid.

Judge Winter found that the photographic lineups were unconstitutional pursuant to *Wade* and *Gilbert*, not only because of the serious impairment to counsel's ability to reconstruct what actually happened at the photographic identification, but because:

> "the greater reliability of identification based upon a person-to-person confrontation ought not be so lightly sacrificed in the absence of a compelling explanation why confrontation under the circumstances of the case was not possible." Ibid.

Finally, Judge Winter found that *Simmons* v. *U.S.* was not relevant to the case under his consideration:

> "I do not read *Simmons* as modifying the application of Wade and Gilbert to post-custody identifications as I read the majority's opinion to suggest. Simmons was not in custody at the time of the identifications made from photographs .... In the instant case Collins was in custody and a corporeal lineup had been held." Ibid.

That *Simmons* does not contemplate photographic identification of an in-custody accused in the absence of exigent circumstances is clearly pointed out by Mr. Justice Douglas in *Biggers* v. *Tennessee*, 390 U.S. 404, (dissenting), decided on the same day as *Simmons*:

> In Simmons, identification by use of photographs rather than a lineup was upheld because the bank robbers were still at large, (and) the FBI had to quickly determine whether it was on the track in looking for Simmons. Ibid. 406-07.

The instant case is replete with the potential evils intended to be safeguarded by *Wade* and *Gilbert*. In the instance

of the witness Davis, no less than three photographic displays in the absence of counsel were conducted, though the petitioner was in custody, and though it appears, beyond dispute, that the witness was available for corporeal identifications. Indeed, one of the photographic displays was conducted at the very police station where the petitioner was being held. Another was conducted by two state police in the secrecy of the witness' home. And still a third, perhaps the most egregious of all, was conducted by the prosecutor alone with Davis. At this display, the prosecutor showed only the photograph of one person—the petitioner. This "show-up" by the prosecutor is so drastic a departure from fairness at a time when *Wade* and *Gilbert* were on the books, that it should be summarily condemned. Yet to all the evils of these private proceedings, the petitioner is left with only the "assurance" that the two witnesses who sealed his fate would earlier have identified him but for their fear.

If *Wade* and *Gilbert* are not to receive mere lip service and are not to be circumvented by easy resort to photographic identification, this Court should accept this matter as a vehicle to clearly announce the reach of the Constitution to photographic identification of criminal accused in custody.

The petitioner submits that the opinion of the court below holding that the absence of counsel at photographic identifications is harmless error, is clearly erroneous under the decisions of this court.

In *Wade*, this court said: "there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.' " Citing *Powell* v. *Alabama*, 287 U.S. 45, 57. And in *Hamilton* v. *Alabama*, 368 U.S. 52, where counsel was not present at arraignment it was held that the absence of counsel was prejudical per

se, drawing on the authority of *Powell* v. *Alabama,* supra. See also, *White* v. *Maryland,* 313 U.S. 59; *Commonwealth* v. *Arsenault,* 393 U.S. 5. And in *Chapman* v. *California,* 386 U.S. 18, 23, citing *Gideon* v. *Wainwright,* this court said that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error...."

II THE TOTALITY OF THE CIRCUMSTANCES RESULTING IN THE IDENTIFICATION OF THE PETITIONER BY THE EYEWITNESS DAVIS DENIED PETITIONER DUE PROCESS OF LAW.

The petitioner argued below that the totality of the circumstances leading to Davis' identification was "so impermissively suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons* v. *United States,* 390 U.S. 377, 384.

As detailed in the Statement of the Facts, the eyewitness Davis was shown, the night following the shooting, a picture of a lineup in which the petitioner appeared. He made no identification. Later that night he saw the petitioner in a TV news clip which related his arrest for the shooting. A few days later he was visited at his home by two state police officers and again shown the lineup picture. And finally, Davis was shown individual pictures of the petitioner by the prosecutor. He made no identification on any of these occasions.

Davis admitted on cross-examination that he had only very brief looks at the assailant. In addition, he informed the police on the day of the shooting, and on the next day, that he did not get a good look at the assailant's face and would not be able to recognize him. Nevertheless he identified the petitioner at the trial and testified that prior failures to identify the petitioner were because of fear of repercussions and not because he was unable. He testified that his in-court identification was not affected at all by the TV

news clip or by the prosecutor's "show-up" by photograph. (Tr. 583).

While it does not presently appear that the prosecution is to be held responsible under existing law for permitting the petitioner to be televised, the prosecution is responsible for the incalculable influence of the single photograph "show-up" of the petitioner. Mr. Justice Douglas' statement in *Bigger* v. *Tennessee*, 390 U.S. 404, 407, (dissenting), regarding the corporeal show-up of a suspect to the victim of a crime has equal relevance here:

> "[S]howing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police *suspect* this man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is likely to be played with the best-intended recollections."

See *Foster* v. *California*, 394 U.S. 440.

It is purely fanciful to believe that the TV news item and the "show-up" had no influence upon Davis' identification. See *Bruton* v. *United States*, 391 U.S. 123. Yet, it is upon Davis' assurances to that effect, that the court below substantially relies.

These assurances hold little security for the petitioner. As observed in *Chemmons* v. *United States*, 408, F2d 1230 (CA-DC), although assertions by a witness of his "positiveness . . . about an independent base for an in-court identification is a relevant factor" — a conclusion with which the petitioner disagrees[3] — "it is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one." Id. at 1242. This Court refused to rely on such assurances in requiring the presence of counsel at lineups. *United States* v. *Wade*, 388 U.S. 218:

[3] No such factor is listed in *United States* v. *Wade*, supra, as among those to be considered. Such testimony by a witness is incompetent as being a conclusion of the ultimate fact to be found.

> "[N]either witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences." Id at 230-1.

The Court below assumes that the identification procedure was improper, but concludes that the "in-court identifications [of the defendant] had an independent origin," and that they were "purged of the primary taint." (App. 23) Citing *United States* v. *Wade*, 388 U.S. 218, 242.

The Court's assumption and conclusion are inconsistent in law. Where it is determined that the totality of the circumstances raise a very substantial likelihood of misidentification, it cannot be said that the in-court identification comes from an independent source. The finding is fatal. The influence discussed in *Stoval* v. *Denno*, 388 U.S. 293, *Simmons* v. *United States*, supra, and *Foster* v. *California*, 394 U.S. 440 cannot be purged. Rather, the test there, is one of harmless error. The Court below has confused upon this issue the "independent source—primary taint" test of *Wade*, supra.

III A Criminal Defendant is Denied Due Process of Law Under the Principle Enunciated in *Brady* v. *Maryland* 378 U.S. 83, Where Though He Has Made Appropriate and Timely Motions for Evidence Favorable to the Defense the Prosecutor Fails to Disclose Until After the Direct Testimony of an Eye Witness a Police Report Obtained the Day Following the Alleged Crime, Which Contains Statements of the Eye Witness That He Did Not See the Perpetrator's Face.

Well in advance of trial, counsel for the petitioner moved to be furnished with exculpatory evidence and with copies

of police department reports. (R. 32-33). The motion for exculpatory evidence was denied. (R. 33). During argument on that motion, the prosecutor said:

> "Your Honor, there is no question that the government has an obligation to furnish defense counsel with any exculpatory statements that we have with respect to his client . . .
>
> "It's an obligation on our part and certainly we would fulfill that obligation if we had the evidence that he is asking for. Unfortunately for him and his client we don't have that type of evidence to turn over" (Tr. page 35, vol. 2, Oct. 7, 1968, Cahill, J.).

Just prior to the taking of evidence at trial, counsel pressed his motion for police department reports. (Tr. 38-41). At that time counsel informed the court of his inability to search the records of the police, and stated, "there is no doubt in my mind that the police do in fact have some information of a contradictory identification concerning this particular case." (Tr. 40). The prosecutor made no response. Seven days later during the course of the trial, well after a voir dire as to the admissibility of the eyewitness Davis' identification and immediately after Davis had completed his direct testimony, the prosecutor approached the bench and informed the court:

> "I have something that I feel is very serious." (Tr. 723).

The prosecutor then recited for the record that he was making available to counsel a police report regarding Davis' statement to the police the day following the shooting. The statement is reproduced in our appendix at page 31. The report states that when Davis was asked by the police

whether he could recognize the fellow who did the shooting. Davis "said he doubted it as he did not get a good look at his face." When reminded that he said he saw the man when he pulled the gun and shot, and that he must have got a good look then, Davis said, "No, I was looking at his hand holding the gun." When reminded further that he told the police that he had seen the man approaching the cab stand, Davis said "he did but did not get a good look at his face." The report states that Davis told the police "he doubted if he could pick him out if he was in the room with us now or in the Quincy Lounge."

Following this disclosure, defense counsel was given a short recess to review the Davis statement.

In *Brady* v. *Maryland*, 373 U.S. 83, this court held that:

> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id* at 87.

Prior inconsistent statements of eyewitnesses fall within that mandate. See *Giles* v. *Maryland*, 386 U.S. 66.

In the instant case, Davis' identification was critical to the Commonwealth's proof. Obviously his prior inconsistent statements were of great import to the defense. And, it is equally clear that the defense had specifically requested such material.

As to the reason for its late disclosure, the prosecutor explained to the court that he "went over this police report in depth with Mr. Davis at Mr. Davis' home yesterday," and in doing so "I noticed this which I feel might be of an exculpatory nature." (Tr. 725). The petitioner submits that irrespective of the prosecutor's explanation, this case is directly controlled by the principle enunciated in *Brady*

v. *Maryland*, supra. Furthermore, the prosecutor's good faith is more than suspect in consideration of the obvious facts that, (1) this particular report, developed from an eyewitness the day following the shooting, must have been a basic document in the prosecutor's file, (2) it was highly impeaching, and (3) the prosecutor, though he had admittedly "noticed" its character on the prior day, waited many hours and until the eyewitness had completed his direct examination late in the morning of the following day, before bringing it to the attention of counsel.

In dealing with the issue below, the court noted that the petitioner made use of the contents of the report on cross-examination of Davis. The court stated that "the report was used to *full advantage* in an attempt to impeach the credibility of Davis' identification," and concluded "we are of the opinion there was no prejudicial error." (App. 26). (Emphasis added)

The right to a defense contemplates the right to prepare that defense. It is patently unfair to surprise counsel with such a disclosure as here, afford him a few minutes recess from the pit of battle, and then require even experienced counsel to make every effective use of the new material when the pressing encounter reconvenes. "A criminal trial, like its civil counterpart, is a quest for truth," and a most effective way of attaining that end is by the "elimination of surprise at trial." *Gregory* v. *United States*, 369 F2d 185, 188 (CA-DC). See also Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963, Wash. U.L.Q. 279.

Furthermore, use for impeachment on the merits at trial was only one of several possible uses to which the Davis statement may have been put. The late disclosure by the prosecution totally denied the petitioner the use of this important evidence on the voire dire as to the admissibility

of Davis' identification. And, if timely available, it may have led to yet other information favorable to the defense. The petitioner submits that the principle of *Brady* v. *Maryland*, supra, does not permit the last minute disclosure made in the instant case.

Conclusion

For the several reasons set forth above, petitioners urgently pray that a writ of certiorari issue from this Court to review the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

ROBERT A. STANZIANI
40 Court Street
Boston, Massachusetts
Atty. for Petitioner

Of Counsel:
CHARLES M. BURNIM
100 State Street
Boston, Massachusetts

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

Norfolk County

Commonwealth

v.

Robert F. Wilson

Argued Jan. 6, 1970
Decided Feb. 12, 1970

Robert A. Stanziani, Boston, for defendant.

A. Russell Lueid, Jr., Special Asst. Atty. Gen., for the Commonwealth.

Before WILKINS, C. J., and KIRK, SPIEGEL and REARDON, JJ.

SPIEGEL, Justice.

[1] The defendant was tried on an indictment which charged that on or about May 11, 1968, he "did assault and beat Richard Webber, with intent to kill and murder him, by shooting him, and by such assault and beating did kill and murder said Richard Webber." The jury returned a verdict of guilty of murder in the first degree with a recommendation that the sentence of death be not imposed. The case was tried subject to G.L. c. 278, §§ 33A-33G, and is here by way of appeal. The defendant filed twenty-three assignments of error but argues only seven of them. Those assignments not argued are deemed waived. *Commonwealth* v. *Kleciak*, 350 Mass. 679, 681, 216 N.E.2d 417.

On Saturday, May 11, 1968, between 6 and 6:30 P.M. Richard Webber, the victim, left the North Quincy Taxi

Company office, where he was employed as a driver. He was next seen by one Barbara Bennett, a waitress and bartender at the Quincy Lounge, Quincy, when she reported for work at 6:45 P.M. The defendant "came in" after Mrs. Bennett had gone on duty as the bartender. One Victor J. Barbati, an owner of the Quincy Lounge, arrived at the lounge "[b]etween eight and 8:30." Following Barbati's arrival, the defendant and Webber exchanged words, after which "they grabbed each other and * * * fell * * * to the floor, * * *. Webber was on the floor on his back * * * [and the defendant] was on top of him." Barbati then went over to the two men "and tried to break * * * up" the fight. He "pulled" the defendant off Webber and "tried to * * * take him out of the bar." However, Webber "got up and charged towards * * * [the defendant], swinging at * * * [him]." The defendant then broke away from Barbati and the two men "started * * * fighting again." The fight was finally stopped and the defendant was "pulled * * * outside the door." In the interim Webber left the lounge and proceeded in the direction of "the North Quincy cab stand, Quincy Square."

On that same evening, John A. Davis, the night dispatcher for the North Quincy Taxi Company "came to work" at 5 P.M. When Davis arrived, Webber was then at the office on "stand-by duty," waiting to see whether "he may have been needed to drive at night." Webber left the stand "between 6:00 and 6:30" P.M. The taxi company office was equipped with a two-way radio, a desk, a pair of telephones and other equipment. On the evening in question Davis, as was his custom, went out of the office and "screwed in" the light on the "left-hand side of the * * * building." Prior to 8:30 P.M. he noticed that the street lights were on and the lighting was "excellent." About 9 P.M. Webber "returned to the cab stand. * * * He looked nervous and afraid * * * his clothes were dis-

arranged, and he had a couple of marks on him." After Webber entered the office, he walked to the desk where Davis was sitting, "picked up the phone * * * dropped * * * [it], and * * * was fumbling around with different objects on the desk." When Webber entered the office he left the door open and Davis observed the defendant approaching the building. After talking with Davis, Webber "stepped outside the cab stand." The defendant was then standing "about twelve or fifteen feet" from the office, when Webber left the building. Webber was "yelling, '[L]eave me alone, stay away from me, stay away from me, leave me alone.'" The defendant stepped up on the curb holding a forty-five calibre automatic in his hand. He had "the gun in around his chest area, * * * he pulled * * * [it] up * * * leveled it toward * * * Webber who was running, and he shot." Davis "ducked" under the desk after the shot was fired. As he arose he saw the defendant turn and run. Shortly thereafter Davis "went out and put * * * [his] sweater over * * * Webber." The cause of Webber's death was "a gunshot wound of the heart." A forty-five calibre bullet was removed from his "left front chest."

At the time the shooting occurred one Sean O'Brien, a driver for the taxi company, was also present at the office and his testimony substantially corroborated Davis's.

1. Assignments 12 and 13 claim error in the judge's denial of the defendant's motion to suppress "the identification testimony" of the witness O'Brien and Davis.

The defendant argues that the improper identification procedure involving the photographs and "the display of photographs of the defendant to the two eyewitnesses to the murder in the absence of the defendant's retained counsel" were respectively a denial of due process of law under the Fourteenth Amendment of the Constitution of the

United States and a violation of the Sixth Amendment "right to counsel at a critical stage of the proceedings."

We shall first discuss the propriety of the identification procedures. On Sunday, May 12, 1968, O'Brien, in the presence of defence counsel, observed the defendant at a lineup containing nine men which was conducted at the Quincy police station. Although O'Brien recognized the defendant, he did not identify him at that time. On the following Tuesday O'Brien called the district attorney and subsequently went to his office. O'Brien discussed the case for about an hour with the district attorney and with one Lieutenant John Regan of the State police. During this meeting O'Brien was not shown any photographs of the defendant. The next day two State police officers came to O'Brien's home and told him that they had a picture of the lineup O'Brien had viewed the previous Sunday. Before O'Brien was shown the photograph, he told the officers that the defendant was the "fourth one in on the right as you are looking at the photo." O'Brien then drew a circle around the defendant's picture. At the trial O'Brien was asked the following question: "At the time you saw * * * [the defendant] at the Quincy [p]olice [s]tation in the lineup, is there any question in your mind that you were able to recognize the defendant * * * ?" He replied, "The minute I saw him in the lineup I recognized him." He did not identify the defendant at that time because he "was scared."

[2] The defendant maintains that his position in the lineup suggested the defendant to O'Brien. The evidence, however, readily answers this contention. Although the defendant was the fourth man from the right, immediately adjacent to three policemen who were known to O'Brien, he was immediately recognized by O'Brien. In these circumstances we believe that the defendant's placement in the lineup was not so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a

denial of due process of law. *Stovall* v. *Denno*, Warden, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199. See *Simmons* v. *United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247.

We next discuss the identification of the defendant by Davis. On the evening the shooting took place Davis told the police he did not think he could identify the individual who did the shooting because "he did not get a good look at his face." On May 12, 1968, Davis, at the request of the police, went to the police station. He was shown a [p]icture of a lineup," but he did not identify the defendant. Following this visit Davis knew that the defendant had been arrested and he had seen a television clip showing the defendant being taken into custody. Between three and five days after the shooting, Davis was visited by two State police officers and was shown a photograph of the lineup viewed by O'Brien. Davis did not make an identification at that time. On Sunday, May 19, 1968, Davis was again requested to come to the police station and was shown two "face view" photographs of the defendant. Again Davis did not identify the defendant.

On May 24, 1968, Davis finally identified the defendant at a probable cause hearing held at the Quincy District Court. It is well recognized that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside * * * only if the photographiic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States, supra*, at 384, 88 S.Ct. at 971. Davis testified that he had several opportunities to observe the defendant. He "saw the full view" of the defendant's face, accurately described the defendant's physical appearance, and the clothing the defendant was wearing at the time of the shooting. At the trial Davis was asked the following question

in cross-examination: "[I]s it fair to say * * * that * * * last May 11, 1968 you weren't sure of the identification of * * * [the defendant] but that you are today? Davis replied that this was not so. He stated that he did not identify the pictures of the defendant because he "was very much afraid of repercussions about this * * * [for] his family and himself." Although Davis admitted that on the night the shooting took place he told the police he "didn't get a good look" at the defendant's face, he said the reason he told this to the police at that time was because he "was afraid."

[3] Even assuming that the identification procedure was improper we are of opinion that the "in-court identifications [of the defendant] had an independent origin." *United States* v. *Wade*, 388 U.S. 218, 242, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149. Davis's in-court identifications of the defendant was "purged of the primary taint" of any improper identification procedure. *United States* v. *Wade*, *supra*, at 241, 87 S.Ct. 1926. *Commonwealth* v. *Cooper*,[a] 248 N.E.2d 253.

We now consider the defendant's contention that he was denied counsel at a critical stage of the proceedings. We recognize that the Sixth Amendment right to counsel may apply to "*any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[1] *United States* v. *Wade*, *supra*, 388 U.S. at 227, 87 S.Ct. at 1932. *Commonwealth* v. *Cooper*,[b] 248 N.E.2d 253.

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[a] Mass.Adv.Sh. (1969) 857, 866.

[1] See *Foster* v. *California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402.

[b] Mass.Adv.Sh. (1969) 857, 863.

[4, 5] Assuming that the exhibition of the defendant's photograph to the witnesses was a "critical stage" of the proceedings, we do not believe that the absence of defence counsel at that confrontation resulted in "substantial prejudice to defendant's rights." *United States* v. *Wade*, *supra*, 388 U.S. at 227, 87 S.Ct. at 1932. Although, even if the identification procedures are assumed to have been in violation of the defendant's constitutional rights, the witnesses are not precluded "from making valid in-court identifications." *Commonwealth* v. *Cooper*, *supra*, Mass.Adv.Sh. at 865, 248 N.E.2d at 260. The Commonwealth has the opportunity to establish that the in-court identifications stemmed from observations of the defendant at a time other than the improper photographic display. *United States* v. *Wade*, *supra*, 388 U.S. at 240, 87 S.Ct. 1926. We believe that O'Brien and Davis each had ample opportunity to observe the defendant at the time of the shooting. It is reasonable to conclude that their failure to identify the defendant did not result from their inability to identify him, but stemmed solely from their fear of identifying him. We note, too, that at the trial the defendant was given broad latitude in the cross-examination of Davis and O'Brien regarding their observations of the defendant at the time of the shooting. The defendant was also permitted to extensively cross-examine the witnesses in an attempt to determine what effect, if any, the viewing of the photographs may have had on their in-court identification of him. In these circumstances, we are of opinion that although the defendant was not represented by counsel at the pretrial photographic confrontation, the absence of counsel was harmless error. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. There was no error in denying the motions to suppress the in-court identifications of the defendant.

[6] 2. Assignments 1, 2 and 4 are based on the denial

of the defendant's motions "to be furnished with exculpatory evidence" and "for production of the Police Department reports." No exception was taken to the denial of the motion to be furnished with exculpatory evidence. Nevertheless, because this is a capital case, we also consider the motion regarding the exculpatory evidence. See *Commonwealth* v. *White*, 353 Mass. 409, 424; 232 N.E.2d 335.

The defendant contends that the Commonwealth suppressed "two pieces of relevant evidence," a television clip showing the defendant being arrested and the statement Davis made to the police that he doubted he could recognize the individual who did the shooting as "he did not get a good look at his face." He also claims "[t]here is the probability that had the film been viewed by the Court and the statement by Davis admitted on the motion to suppress, * * * [Davis's] testimony would have been excluded." The defendant further asserts, "[t]here is also the possibility that if the film was shown it may have been so susceptible to the vice of suggestion as to have excluded both in court identifications by Davis and O'Brien."

[7] At the time of the voir dire hearing on the defendant's motion to suppress the identification testimony it seems clear that the Commonwealth had possession of the television film. It was not produced at the hearing and the defendant, at that time, did not request that it be produced so that the judge might view it. However, the evidence disclosed that although Davis had seen the film, his identification of the defendant at the probable cause hearing had not been affected thereby.

We have difficulty in following the defendant's argument that had the film clip been shown to the court not only would Davis's in-court identification have been excluded, but O'Brien's in-court identification would also have been excluded. There was no evidence that O'Brien had ever seen the film. In fact, on cross-examination the defendant

did not even ask O'Brien if he had seen the film. In these circumstances, we do not agree with the defendant that the showing of the film would have resulted in the exclusion of the in-court identifications by either Davis or O'Brien.

We next consider the defendant's argument that the statement of Davis in the police report was exculpatory. The report shows that Davis said he "doubted" that he could recognize the fellow who did the shooting as he "did not get a good look at his face." The instant case differs substantially from *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, relied on by the defendant. In that case the prosecution withheld a co-defendant's confession to the murder with which the defendant was charged and found guilty.

[8] Even if we assume that the statement was exculpatory, and although we are unaware of any reason for the judge's refusal to allow the defendant's motion at the trial, the Commonwealth made the police report available to the defendant after direct examination of Davis because it felt that it was "possibly of exculpatory nature."[2] The defendant had the opportunity to use, and did use, the contents of the report as a basis for an extended cross-examination of Davis on this point. The report was used to full advantage in an attempt to impeach the credibility of Davis's identification. We are of the opinion there was no prejudical error.

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[2] The record discloses that after the police report containing Davis's statement was given to defence counsel the following discussion took place at the bench: *The Court.* "Do you want time to look them over before you start your cross-examination or not?" *Counsel for the defendant.* "Judge, I suppose I should." *The Court.* "Do you or not want time to look them over?" *Counsel for the defendant.* "Can I have a five-minute recess, please?" *The Court.* "I said do you want time. If you do, then I will rule." *Counsel for the defendant.* "Yes." *The Court.* "You want time?" *Counsel for the defendant.* "Yes." *The Court.* "All right." (End of bench proceeding.) *The Court.* "We will take a short recess, jurors, on account of the matter that just developed." (Recess.)

[9, 10] 3. Assignment 14 states that "the trial judge erred in unduly restricting the scope of the voir dire on the motions to suppress identification testimony * * * by refusing to let defense counsel cross-examine the witnesses who testified and introduce evidence on behalf of the defendant." The defendant contends that these restrictions constituted "a denial of due process of law." He argues that "it is unrealistic to rule that * * * [he] cannot cross-examine police officers who are hostile to him." Once again it is difficult to follow the defendant's argument. In the first place, it is unnecessary for a defendant to show that a police officer, a witness for the Commonwealth, is hostile in order to permit the defendant to cross-examine him. Secondly, the transcript reveals that at the voir dire the defendant was not only permitted to cross-examine the *one* police officer called by the Commonwealth, but that the cross-examination was conducted without a single interruption by either the prosecutor or the court. In any event, the extent of cross-examination rests within the sound discretion of the trial judge. *Commonwealth* v. *Coshnear*, 289 Mass. 516, 527, 194 N.E. 900.

[11, 12] We now turn to the defendant's claim that he was "forbidden to cross-examine * * * witnesses [for the Commonwealth]," who "had made a substantial showing of hostility when * * * [the defendant] attempted to interview them." This contention is directed at the defendant's voir dire examinations of Davis and O'Brien. However, Davis and O'Brien were called as witnesses for the defence. "Rulings on whether a witness is hostile and whether cross-examination of the witness by his proponent should * * * be permitted are within the discretion of the trial judge." *Commonwealth* v. *Monahan*, 349 Mass. 139, 162-163, 207 N.E.2d 29, 43. There is no evidence that the witnesses were hostile. During an interview with the defendant, Davis explained that he preferred not to answer any questions

concerning the shooting at that time because he wanted to explain the circumstances "in court one time and one time alone." While O'Brien admittedly refused to be interviewed by the defendant, the refusal is not necessarily proof of hostility. There was no evidence that O'Brien was biased against the defendant. Even on the occasions when the defendant was prevented from cross-examining his own witnesses, he did not raise the question of their being hostile. We perceive no abuse of discretion.

[13, 14] Our final consideration under this assignment of error deals with the defendant's contention that the judge wrongfully "excluded the script of the newscast of the * * * [defendant's] arrest" because of the film's relevancy on the issue of suggestive identification. It seems to us that the script without the showing of the newscast would not be admissible. If the film had been admitted in evidence as it should have been, the script would be admissible. Nevertheless, as heretofore outlined, because of the extensive cross-examination permitted the defendant regarding the film, any error relating to either the film clip or its accompanying script was harmless. Reviewing all of the evidence in proper context leads us to conclude that there was no "denial of due process of law."

[15] 4. Assignment 9 is based on the judge's failure to permit "defense counsel an opportunity to state his reasons for objecting to the impanelment of the juror, Francis E. McGinty, outside of the presence and hearing of the jury." Contrary to the defendant's assertion, there is no reason to "believe that * * * McGinty would not be a suitable juror because of his familiarity with the locale and the facts of the case." The defendant did not challenge the juror, but stated that he had "additional questions" which he thought were "pertinent." The judge inquired whether the fact that the juror came from Quincy was "a factor" and the defendant's counsel replied in the affir-

mative. After this colloquy the judge permitted him to approach the bench. After the conference, and apparently at the defendant's suggestion, the judge asked McGinty if he had read about the shooting. McGinty replied, "I don't recall ever having read anything about it." The judge then declared him "indifferent."[3] The defendant's reliance on the case of *Commonwealth* v. *Crehan*, 345 Mass. 609, 612-613, 188 N.E.2d 923, is unfounded. The discussion between the defendant and the judge regarding the empanelment of McGinty was not of a nature to have a prejudical effect on the jury or to influence them in any way. We are satisfied that "[i]n all respects the judge was meticulous to insure the empanelling of a jury free from bias." *Commonwealth* v. *Kiernan*, 348 Mass. 29, 36, 201 N.E.2d 504, 508.

[16] Finally, mindful of the obligation imposed by G. L. c. 278, §33E, as amended by St.1962, c. 453, we have reviewed the entire record with great care and are of opinion that justice does not require a new trial or the entry of a verdict of a lesser degree of guilt.

Judgment affirmed.

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[3] Following this statement by the judge there was a conference between the defendant and his counsel, after which the court was informed that the defendant was "satisfied." Thereupon McGinty was "sworn" as a juror. After McGinty had been directed to "join the other jurors" defendant's counsel again addressed the court and took an exception to the empanelling of McGinty.

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Dawn Shelton

s Davis Statement.

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SUPREME COURT, U. S.

Court, U.S.
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JUL 23 1970
E. ROBERT SEAVER, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 252

ROBERT F. WILSON,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General

GEORGE BURKE
District Attorney
Of counsel:
BARBARA SMITH.

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In the
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COMMONWEALTH OF MASSACHUSETTS,
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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Jurisdiction

Jurisdiction of this Court is involved under 28 U.S.C. 1257 (3).

Opinion Below

See opinion of the Supreme Judicial Court of Massachusetts as reported at 1970 Mass. Adv. Sh. 235, 255 N.E. 2d 744.

Questions Presented

1. Whether counsel is required at the photographic display of a criminal accused, conducted while the accused is in custody and in the absence of compelling urgency; and if such right to counsel existed, can it ever be treated as harmless error.

2. Whether the totality of the circumstances resulting in the identification of the petitioner by the eye witness Davis denied the petitioners due process of law.

3. Whether a criminal defendant is denied due process of law under the principle enunciated in *Brady* v. *Maryland*, 373 U.S. 83, where, the prosecutor discloses a police report obtained the day following the alleged crime, containing statements of the eye witness that he did not see the perpetrator's face after the witness's direct testimony.

Statement

After a jury trial, petitioner was convicted in the Norfolk Superior Court of murder in the first degree in violation of Mass. Gen. Laws, Ch. 265, §1. Upon recommendation of the jury that the death sentence be not imposed, petitioner was sentenced to imprisonment for life. On appeal, the Massachusetts Supreme Judicial Court — after, according to Massachusetts procedure, reviewing the entire transcript and evidence (Mass. Gen. Laws Ch. 278, §33E) — unanimously affirmed the conviction. *Commonwealth* v. *Wilson*, 1970 Mass. Adv. Sh. 235 N.E. 2d 744 (1970)

The Commonwealth's evidence (the sufficiency of which petitioner does not challenge here) consisted mainly of eye witness testimony. The evidence, as fully reported in the opinion below, showed that on Saturday, May 11, 1968, Richard Webber, the victim, left the North Quincy Taxi Company where he was employed as a driver. He was

next seen by one Barbara Bennett, a waitress and bartender at the Quincy Lounge, Quincy, when she reported for work at 6:45 P.M. The defendant "came in" after Mrs. Bennett had gone on duty as the bartender. One Victor J. Barbati, an owner of the Quincy Lounge, arrived at the lounge "[b]etween eight and 8:30." Following Barbati's arrival, the defendant and Webber exchanged words, after which "they grabbed each other and . . . fell . . . to the floor. . . . Webber was on the floor on his back . . . [and the defendant] was on top of him." Barbati then went over to the two men "and tried to break . . . up" the fight. He "pulled" the defendant off Webber and "tried to . . . take him out of the bar." However, Webber "got up and charged towards . . . [the defendant], swinging at . . . [him]." The defendant then broke away from Barbati and the two men "started . . . fighting again." The fight was finally stopped and the defendant was "pulled . . . outside the door." In the interim Webber left the lounge and proceeded in the direction of "the North Quincy cab stand, Quincy Square."

On that same evening, one John A. Davis, the night dispatcher for the North Quincy Taxi Company "came to work" at 5 P.M. When Davis arrived, Webber was then at the office on "stand-by duty," waiting to see whether "he may have been needed to drive at night." Webber left the stand "between 6:00 and 6:30" P.M. The taxi company office was equipped with a two-way radio, a desk, a pair of telephones and other equipment. On the evening in question Davis, as was his custom, went out of the office and "screwed in" the light on the "left-hand side of the . . . building." Prior to 8:30 P.M. he noticed that the street lights were on and the lighting was "excellent." About 9 P.M. Webber "returned to the cab stand. . . . He looked nervous and afraid . . . his clothes were disarranged, and he had a couple of marks on him." After Webber entered the office,

he walked to the desk where Davis was sitting "picked up the phone . . . dropped . . . [it], and . . . was fumbling around with different objects on the desk." When Webber entered the office he left the door open and Davis observed the defendant approaching the building. After talking with Davis, Webber "stepped outside the cab stand." The defendant was then standing "about twelve or fifteen feet" from the office, when Webber left the building. Webber was "yelling, '[l]eave me alone, stay away from me, stay away from me, leave me alone.' " The defendant stepped up on the curb holding a forty-five calibre automatic in his hand. He had "the gun in around his chest area, . . . he pulled . . . [it] up . . . leveled it toward . . . Webber who was running, and he shot." Davis "ducked" under the desk after the shot was fired. As he arose he saw the defendant turn and run. Shortly thereafter Davis "went out and put . . . [his] sweater over . . . Webber." The cause of Webber's death was "a gunshot wound of the heart." A forty-five calibre bullet was removed from his "left front chest."

At the time the shooting occurred one Sean O'Brien, a driver for the taxi company, was also present at the office and his testimony substantially corroborated Davis's.

Argument

I. The Petitioner Claims Error In The Judge's Denial Of The Defendant's Motion To Suppress "The Identification Testimony" Of The Witnesses O'Brien And Davis.

In *U.S.* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) the Supreme Court held that a defendant's Sixth Amendment right to counsel applied to any 'critical stage' of a criminal proceeding, i.e.

wherever counsel is necessary to assure a meaningful defense. These cases dealt with post-indictment lineups. The test developed in *Wade* for determining such a 'critical state' at which counsel is required is "where counsel's absence might derogate from the accused's right to a fair trial." (P. 224).

Petitioner cites *Simmons* v. *U.S.*, 390 U.S. 377 in support of his claim that the pre-trial photographic display, in absence of counsel, to witness, Davis, was a denial of his Sixth Amendment right to counsel. However, the Supreme Court, as petitioner acknowledges did not reach the issue of right to counsel since the accused was at large at the time of the photographic identification. Petitioner implies, however, that the Court would sanction the use of photographic identifications in the absence of counsel *only* for the purpose of ". . .apprehending offenders and of sparing innocent suspects the ignominy of arrest. . ." (384). This Court, however, did not limit the use of photographic identifications in absence of counsel to the above two situations. While acknowledging the possibility of misuse of this identification procedure the Court held "We are unwilling to prohibit its employment, either in the exercise of our Supervisory Power or *still less*, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (384).

Petitioner maintains that his contention that *Simmons* was meant to apply to photographic identifications of suspects in custody is reinforced by Justice Douglas' dissent in *Biggers* v. *Tennessee*, 390 U.S. 404 (1967). That

case is distinguishable. The suspect was shown individually to the victim who was told by the police that they wanted her "to look at a suspect." The identification took place seven months after the assault, which had occurred at night. The victim was unable to give more than a very general description of her assailant. Her daughter was unable to identify the defendant and the victim did not make a direct identification of the defendant in court. In the instant case the photographs were shown while the witness' memory was fresh and Davis was able to give an accurate description of the defendant's physical appearance and clothing before viewing the photographs.

The federal courts have declined to interpret *Simmons* as requiring counsel at photographic identifications made out of court.

"To require presence of counsel at out of court proceedings where the defendant is not present is to press the Sixth Amendment beyond any previous boundary." *U.S.* v. *Bennett*, 409 F.2d 888, 889 (2nd Cir. 1969) cert. den. 396 U.S. 852. The court further noted that in those cases in which the court held that counsel was required, none involved procedures in which the defendant was not present — where he could not be led into a 'trap.' Moreover, the 2nd circuit pointed out that there were other types of interviews with witnesses that afforded as much opportunity for suggestiveness as a display of photographs, in which the presence of opposing counsel was not required. In *U.S.* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970) the defendant was in custody at the time of the photographic display. The court held that the Sixth Amendment did not apply to photographic identification regardless of whether the accused is in custody or not. "Neither *Gilbert* nor *Wade* through or outside *Simmons* require counsel for an accused be present at the time of an out of court photogra-

phic identification." Similarly, in *U.S.* v. *Conway,* 415 F.2d 158 (3rd Cir. 1969) the federal court held that where there was no form of confrontation, nor communication and where the defendant was not required to be present, *Wade* and *Gilbert* did not apply "since the pre-indictment photographic identifications were not a 'critical stage' of the proceedings where presence of counsel could meaningfully have preserved defendant's right to a fair trial." (162)

Therefore, respondent submits that the Sixth Amendment guarantee of right to counsel does not extend to photographic identifications and that even if presence of counsel is required, his absence is error harmless beyond a reasonable doubt. Those cases which have held that absence of counsel was prejudicial have involved quite distinguishable situations, i.e. *Hamilton* v. *Alabama,* 368 U.S. 52 (1961), where counsel was not present at arraignment where insanity defense must be pleaded or lost; and *Arsenault* v. *Mass.,* 393 U.S. 5 (1968) where counsel was not present at probable cause hearing and defendant pleaded guilty; which plea was offered into evidence at his trial. In these cases absence of counsel would most probably lead to the denial of a fair trial, but in the instant situation any improprieties in the procedure are open to review through cross-examination, which the petitioner had ample opportunity to explore and did explore.

II. The Procedures Involved In The Photographic Identification Were Not So Impermissibly Suggestive Or Conducive To Irreparable Mis-Identification As To Amount To A Denial Of Due Process.

Witness, Davis, who did not attend the lineup, was shown a photograph of the lineup on the evening of May 12, 1968. No identification was made. Later that night

Davis saw a television newsclip of an arrest for the shooting in which the petitioner was shown in handcuffs. A few days later two state police officers again showed him the lineup picture at his home. Davis made no identification. On May 19, 1968, Davis was again called to the police station where he was shown a front and side view of the petitioner alone. Davis did not identify the petitioner.

Finally, on May 24, 1968 Davis identified the petitioner at a probable cause hearing.

Davis testified at trial that his failure to identify the photographs was because he "was very much afraid of repercussions about this . . . for his family and himself." Respondent contends that viewed in the "totality of the surrounding circumstances", the identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Simmons*, supra, 384.

In *U.S.* v. *O'Connor*, 282 F.2d 963 (D.C. Cir. 1968) the court outlined some of the factors, including those stated by the Supreme Court in *Simmons*, to be considered in the determination of whether pre-trial 'confrontation' was impermissible. Were other persons so near to the scene of the crime that they could be confused with the suspect? Here, there is no evidence of such other persons. Nor, were any statements indicating guilt printed on the pictures. The defendant was not masked and the visibility was good. There is no evidence that the witnesses consulted with each other as to the identification of the defendant. Nor, does the evidence indicate that the police made any statements indicating their belief in the suspect's guilt.

Davis did not identify the picture because, as he testified, he was afraid; and under oath, he testified that he was sure of the identification of the defendant on May 11, 1968 — 8 days prior to being shown the 'face view'

photographs. Respondent urges that the procedures used did not constitute a denial of due process.

II.B Even If The Pre-Trial Identification Procedures Were Tainted, The In-Court Identification Of The Petitioner Is Admissible As Deriving From An Independent Source.

In *Wade*, supra the court held that the courtroom identification by a witness should not be held inadmissible because of improper pre-trial procedures until the Government had opportunity to present "clear and convincing" evidence that the in-court identification was based on an independent source. The test to be applied was set forth in *Wong Sun* v. *U.S.*, 371 U.S. 471, 488 (1963).

> "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (P. 241)

The Court then outlined the factors to be considered in applying the test: Was there prior opportunity to observe the alleged criminal act? The witness in this case observed the defendant approaching the building. He saw him standing twelve to fifteen feet away. Street lights were on. He saw the defendant step upon the curb with a gun in his hand and saw him pull it up and level it at the defendant and shoot.

Was there a discrepancy in the witnesses pre-lineup description and the defendant's actual appearance? Davis accurately described the defendant's appearance and clothing. He testified that he saw the defendant's "full face" and that he had told the police he didn't get a good look

because he "was afraid." (See, also, *U.S.* v. *Clark,* 289 F. Supp. 610 (E.D. Pa. 1968).

Moreover, the defendant did not identify anyone else; and his failure to identify the defendant was a result of his fear for his family and himself. Finally, there was no appreciable lapse of time between his observation of the crime on May 11, 1968, and his identification of the defendant at the probable cause hearing on May 24, 1968.

Respondent submits that the witness' testimony establishes by 'clear and convincing evidence' that his in-court identification was based upon observations of the suspect other than the photographic display. *U.S.* v. *Wade,* supra; *Wright* v. *U.S.,* 404 F. 2d 1256 (1968). And, therefore, the in-court identification of the defendant was "purged of the primary taint" (*U.S.* v. *Wade,* supra 241) and was admissible. See *United States* v. *Butler,* —— F. 2d —— (C.A. 1, June 3, 1970).

III. The Report Of The Witness Davis Was Made Available To The Defendant.

The record is found in footnote 2 of the opinion of the Supreme Judicial Court. It reveals the following discussion:

The Court: "Do you want time to look them over before you start your cross-examination or not?" Counsel for the defendant. "Judge, I suppose I should." The Court: "Do you or not want time to look them over?" Counsel for the defendant. "Can I have a five-minute recess, please?" The Court: "I said do you want time. If you do, then I will rule." Counsel for the defendant. "Yes." The Court: "You want time?" Counsel for the defendant, "Yes." The Court: "All right." (End of bench proceeding.) The Court: "We will take a short recess, jurors, on account of the matter that just developed." (Recess.)

No further requests for extention of time were sought by the defendant.

Thus the statement sought was made available to the defendant at the conclusion of the witnesses direct testimony. This is consistent with the present practice in the federal courts. See 18 U.S.C., §3500 (b).

Nothing in *Brady* v. *Maryland* requires that a general request for all exculpatory evidence permits a defendant to obtain a complete copy of the government's file upon request.

In the instant case, nothing was suppressed. Moreover, the fact that the witness had at one time failed to identify the defendant "because of fear" was adequately explored. The "Davis Statement" (appended to the defendant's brief) also cannot be considered to be exculpatory. The report is the hearsay of a police officer as to what one eyewitness said in describing the defendant to the police. The statement adequately describes the defendant in height and build and specifically identifies the clothing. The statement "I didn't get a good look at his face" is not exculpatory as was the confession in *Feldon* v. *Rundle,* 410 F. 2d 1300, or the extrajudicial statements of the defendant in *Brady* v. *Maryland,* 373 U.S. 83, but can be considered as harmful to the defendant as it might be helpful. Moreover, unlike all the cases cited by the defendant this report was available after the direct testimony of the eyewitness. The prosecutor turned it over to the defense counsel when he realized that it might possibly be exculpatory. This is, therefore, not a suppression case as suggested by the defendant.

Since defendant made full use of the report, during the trial, the error, if any, is harmless beyond a reasonable doubt.

Conclusion

For the reasons stated in its brief the Commonwealth respectfully suggests that this petition be denied.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
JOHN J. IRWIN, JR.,
Assistant Attorney General,
Chief, Criminal Division
RUTH I. ABRAMS
Assistant Attorney General

GEORGE BURKE
District Attorney
Of counsel:
BARBARA SMITH.